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October 7, 2020

VIA ECF

The Honorable Nancy E. Brasel
United States District Court District of Minnesota
316 N. Robert Street
St. Paul, Minnesota

Re: *Carson, et al. v. Simon*, 0:20-cv-02030-NEB-TNL
Response to Defendant-Intervenors' Letter of October 7, 2020

Dear Judge Brasel,

The District of New Jersey opinion presented by Intervenors is not persuasive in its treatment of votes that arrive at polling places after Election Day. As Plaintiffs have explained, the federal requirement that Election Day mark the “‘consummation’ of the process of selecting an official,” *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001), necessarily encompasses a rule that the vote be cast with election officials by Election Day.

In any event, even if federal law merely requires that ballots be *mailed* on Election Day, the New Jersey postmark rule adjudicated in that case stands on a more solid foundation than the Secretary's policy in at least two respects. First, the New Jersey legislature enacted the provision, as Article II requires. Second, that legislation is better tailored to the state's obligation to ensure that the vote occur on Election Day, not after Election Day. The New Jersey law treats ballots without a postmark as valid only if they arrive at polling places within *two days* of Election Day, which the court found rendered it a “remote” possibility that ballots mailed after Election Day would be counted. *See* Clark Letter Exhibit at 25. The same cannot be said of the Secretary's policy of counting ballots received a full *seven days* after Election Day.

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Finally, the New Jersey decision provides further support for Plaintiffs' contention that many ballots are likely to arrive at polling places with no postmark at all. *See id.* at 22.

Sincerely,

/s/ Danyll W. Foix

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**pro hac vice motion forthcoming

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